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6 **UNITED STATES BANKRUPTCY COURT**
7 **DISTRICT OF ARIZONA**

8 In re:

9 BCE WEST, L.P., *et al.*,

10 Debtors.

11 EID # 38-3196719
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17
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19 In Re:

20 BOSTON CHICKEN, INC.

21 In Re:

22 MAYFAIR PARTNERS L.P.
23

24 In Re:

25 BC REAL ESTATE INVESTMENTS, INC.
26

Chapter 11

Case Nos. 12547
Through 12570 ECF CGC

Jointly Administered

**RTM's REPLY TO MOTION FOR ORDER
REQUIRING DEBTOR TO COMPLY WITH
TERMS OF COLUMBIA PURCHASE
CONTRACT**

98-12548-ECF-CGC

98-12549-ECF-CGC

98-12564-ECF-CGC

DATE: August 24, 1999
TIME: 10:00 A.M.

27 Movant RTM Portland, Inc. ("RTM") replies in opposition to the Debtor's Response and
28 Columbia Credit Union's ("Columbia") Response to RTM's Motion to Compel the Debtor to Sell

1 Boston Chicken Store 588 in Vancouver, Washington. RTM has been approved by the Court as the
2 backup bidder for the store and accordingly has entered into a purchase contract and first amendment
3 thereto ("RTM Purchase Contract") and deposited over \$50,000 into escrow. As backup bidder, RTM
4 can proceed and has the right to proceed to closing under the RTM Purchase Contract upon notice from
5 the Debtor that Columbia's transaction has failed to close.

6 All the time periods have run under the purchase contract between Debtor and Columbia
7 ("Columbia Purchase Contract"). The Debtor has unilaterally determined to waive the time periods and
8 to allow Columbia to attempt to remove a title restriction that prevents it from operating the property
9 as a credit union, despite the clear and unequivocal language in the contract that the purchase is "as is"
10 and that no warranties of title are being made. [Columbia Purchase Contract, § 9]. The Columbia
11 Purchase Contract provides that time is of the essence thereunder. [Columbia Purchase Contract, § 24].

12 Such actions are not contemplated by the Court's order approving the sale, nor by the Columbia
13 Purchase Contract. Furthermore, it is in the best interests of the Estate to terminate the Columbia
14 Purchase Contract and proceed to closing under the RTM Purchase Contract, as RTM has no such title
15 restrictions precluding its use of the property as a restaurant. Accordingly, Movant has requested an
16 order from the Court requiring Debtor to enforce the terms of the Columbia Purchase Contract as
17 originally written.

18 Further, RTM replies to the arguments raised in the Debtor's and Columbia's respective
19 Responses as further set forth herein.

20 **I. RTM Has Standing to Bring its Motion to Compel Debtor Comply with the Court's Order.**

21 Debtor claims that RTM lacks standing to bring its motion, because it is not a party in interest
22 that is aggrieved by Debtor's actions. Debtor fails to point out that RTM is much more than merely an
23 unsuccessful bidder. It has been approved by the Court as a successful, next-in-line backup bidder, in
24 accordance with the Amended Order on Fourth Motion for Authority to Sell Real Property Outside
25 Ordinary Course of Business Free and Clear of Liens (DE #619) (the "Order"). In that capacity, RTM
26 executed the RTM Purchase Agreement, for a purchase price of \$1,095,000 and deposited earnest money
27 in excess of \$50,000 in escrow in April 1999.

1 The cases cited by Debtor are inapposite to RTM's relationship as a court-approved backup
2 bidder, under contract with the Debtor. "None of the cases denying appellate standing to a disappointed
3 bidder for a debtor's asset suggests that an actual successful buyer of a substantial portion of a debtor's
4 assets . . . lacks standing." Everex Systems, Inc. v. Cadtrak Corp. (In re CFLC, Inc.), 89 F3d 673, 675
5 (9th Cir. 1996), *citing* G-K Development Co. v. Broadmoor Place Investments, L.P. (In re Broadmoor
6 Place Investments, L.P.), 994 F.2d 744, 746 n.2 (10th Cir. 1993), cert. denied, 510 U.S. 1071, 114 S.
7 Ct. 877, 127 L. Ed. 2d 73 (1994); Davis v. Seidler (In re HST Gathering Co.), 125 Bankr. 466 (W.D.
8 Tex. 1991); Big Shanty Land Corp. v. Comer Properties, Inc., 61 Bankr. 272 (N.D. Ga. 1985).

9 In the instant case, RTM is a successful bidder, its bid being dependent on one condition
10 precedent, Columbia's failure to consummate the transaction. The cases cited by Debtor distinguish the
11 status of an unsuccessful bidder and that of a contractual relationship, holding that the existence of a
12 contract between the debtor and a bidder accords the bidder with the status of an "aggrieved person."
13 G-K Development Co., at 994 F.2d 745. Where the bidder has entered into a contract, he has the
14 standing to object to a proposal. In re Lambert, 54 BR 371, 373 (D. N.H. 1985).

15 In addition, Debtor continues to retain RTM's earnest money deposit and will continue to do so
16 if this motion is denied, until the Court makes a determination in the adversary proceeding filed by
17 Riverview Community Bank ("Riverview"), thereby depriving RTM the use of such deposit for an
18 indeterminate time period. Under the terms of the RTM Purchase Contract, Debtor can continue to
19 require RTM to be obligated as backup bidder and retain its earnest money deposit without interest until
20 the transaction closes. Clearly, RTM is an aggrieved party, entitled to standing to bring this motion.

21 **II. The Activities of the Debtor in Delaying the Sale Are Outside the Ordinary Course of**
22 **Business and Therefore Exceed the Debtor's Authority.**

23 **A. The Court Has by its Orders Established Procedures in the Bid Process Which**
24 **Have Been Ignored by the Debtor in its Negotiations with Columbia.**

25 The Debtor claims its acts have been within its discretion in the ordinary course. Such an
26 argument presupposes that no order is in place addressing such activities. 11 U.S.C. § 363 (c) provides
27 that "**unless the court orders otherwise**, the trustee may enter into transactions, including the sale or
28 lease of the property of the estate within the ordinary course of business. . .". [Emphasis added.] The

1 Debtor established bidding procedures, which included the following:

2 a. Each bidding party will agree to be bound by the standard contract terms promulgated
3 by the Debtors;

4 * * *

5 c. The successful bidder will be allowed a thirty (30) day due diligence period with
6 closing to take place within thirty (30) days of the completion of due diligence;

7 * * *

8 e. upon completion of the due diligence period, the earnest money becomes non-
9 refundable;

10 [Fourth Motion for Authority to Sell Real Property Outside the Ordinary Course of Business Free and
11 Clear of Liens].

12 Such procedures were approved by the Court in its Order, finding the process was conducted in
13 good faith in accordance with 11 U.S.C. § 363 (m). In reliance on the time periods provided in the
14 bidding guidelines, and on review of the form purchase contract, RTM relied on the foregoing in placing
15 its bid. Any actions materially varying from such procedures should have been duly noticed to all
16 interested parties.

17 **B. The Court's Amended Order on the Debtor's Fourth Motion for Authority**
18 **Approved the Sale to Columbia, but Only on the Terms and Conditions Contained**
19 **in the Standard Form Contract.**

20 The Court's Order approved the transaction in accordance with the terms and conditions of the
21 standard form purchase contract. Both the Columbia Purchase Contract and the RTM Purchase Contract
22 were required by the Court's Order to be in this form. The standard purchase contract provided a thirty
23 (30) day inspection and sixty (60) day feasibility period and required the closing to take place within
24 seven (7) days thereafter.¹ The Columbia Purchase Contract provided that "time is of the essence" with
25 respect to performance of the agreement. [Columbia Purchase Contract, §24].

26 The Debtor has unilaterally determined not to abide by these terms and conditions, and to instead
27 wait and see whether Columbia will prevail in the adversary proceeding brought by Riverview. Debtor's
28 actions subsequent to the bid have materially changed the terms of the transaction. The August 11, 1999

¹The Columbia Purchase Contract varied from the standard form purchase contract, as it
contained two extensions of the permit period, adding an additional 45 days to the permit period.

1 letter agreement entered into between the Debtor and Columbia [Exhibit 1, Debtor's Response] has
2 extended the inspection periods and closing date far beyond the original period provided in the Columbia
3 Purchase Contract. Columbia's earnest money deposit remains refundable, in violation of the Columbia
4 Purchase Agreement, despite the delay [Columbia Purchase Agreement, § 4]. Such actions are clearly
5 not contemplated by the Court's Order or the standard form purchase agreement.

6 **C. The Debtor's Modifications Are Beyond the Ordinary Course of Business.**

7 Debtor's use of the "Ordinary Course" standard fails to address the fact that the Court has already
8 restricted the Debtor's activities by its Order. That order specifically provided dates certain by which
9 due diligence and closing were to occur and required the bidder and backup bidder to be bound by the
10 standard form contract. Debtor's unilateral actions have materially varied from such provisions.

11 As such, the renegotiation of this transaction with Columbia is outside of the ordinary course of
12 business. As contemplated in the Second Amendment to Purchase and Sale Agreement proposed by the
13 Debtor and Columbia [Debtor's Response, Exhibit 1], which will be entered into should Debtor prevail
14 in this motion, the Inspection Period is extended until an order is obtained dismissing Riverview's
15 adversary proceeding and all appeals thereon have been exhausted. This renders virtually meaningless
16 the concept of "time is of the essence." If Riverview prevails, then all of Columbia's earnest money is
17 to be returned and its purchase agreement is terminated, without any penalty. RTM would be expected
18 as backup bidder to perform under the RTM Purchase Contract. RTM was never given notice of
19 Debtor's waiver or extension of Columbia's time periods, such waiver and extension being directly
20 contrary to the terms of the bid and the Court's Order, requiring execution of the standard form contract,
21 by Columbia. Such delays have real world consequences, given the current trend of volatile interest
22 rates, and the time of year at which any construction would have to take place.

23 The horizontal dimension test and the vertical dimension test asserted by the Debtor attempts to
24 evaluate the risk to creditors of the Estate in determining the Debtor's discretion to vary the terms of the
25 Court's order. The second amendment to the Columbia Purchase Contract, would create significant risk
26 to creditors of the Estate. That amendment would allow Columbia's interest bearing earnest money
27 deposit to remain refundable. By not providing for a timely close of the transaction, creditors would lose

1 the interest that could be earned by the estate on the purchase price. There also remains a question of
2 whether the sale to Columbia will ever close.² Under the Debtor's application of the "ordinary course"
3 doctrine, Debtor would have the right to alter, vary or waive any and all terms and conditions of the
4 Columbia Purchase Contract, including not only the time for performance and non-refundability of
5 earnest money, but also the price and other material contract terms. Such an interpretation undermines
6 the authority of the Court's Order and the integrity of the approved bidding process.

7 **III. It Is in the Best Interests of the Estate to Terminate Columbia's Purchase Contract as a**
8 **Result of its Breach and Instruct RTM to Proceed.**

9 **A. Debtor's Renegotiation of the Transaction with Columbia Has Created a Chilling**
10 **Effect with Respect to the Bidding Process.**

11 As the backup bidder, RTM is contractually obligated to perform in the event Columbia failed
12 to do so within the time periods provided by Columbia's Purchase Contract. The Debtor's procedures
13 at the inception of the bid, requiring execution of the same form contract and providing feasibility dates
14 were implemented for the purpose of ensuring that bidders be treated fairly and consistently. RTM
15 relied on the consistent treatment of all bidders and the relatively short closing date in fashioning its bid.
16 Debtor's material modification of the Columbia Purchase Contract without any notice and opportunity
17 to object has created a chilling effect on the bidding process, because no credence can be given to a
18 process where bidding parties are treated differently. See Cargill, Incorporated v. Charter International
19 Oil Company (In re the Charter Company), 829 F. 2d 1054, 1055, n. 1 (11th Cir 1987) (reopening
20 bidding can chill future interests in purchasing bankruptcy estate assets).

21 Columbia's response has been to increase its bid in the hope to ameliorate such claims. While
22 increasing the bid may provide some limited value to creditors of the Estate, it fails to take into account
23 the loss the Estate will suffer during the pendency of the transaction. Such actions have and will continue
24 to cause the Estate to lose interest on the monies it would have already received had the transaction
25 already closed. In agreeing to such extensions, the Debtor will have negotiated away its ability to keep

26 ²Columbia goes to great lengths to convince the Court that it will prevail in the adversary
27 proceeding; however, Columbia's position *vis a vis* the adversary proceeding is not relevant to this
28 motion. Under the terms of the Columbia Purchase Contract, it was to either take the property "as is"
or terminate the contract during the inspection period.

1 the earnest money should the transaction with Columbia fail to close.

2 **B. RTM Has No Difficulty with the Restrictive Covenant to Which Columbia Objects.**

3 Columbia's reason for its refusal to close the transaction is a restrictive covenant that prohibits
4 the use of the property as a credit union. This does not prevent Columbia from taking title; it merely
5 prevents the site to be used to conduct the business of a financial institution. The restrictive covenant,
6 which is the subject matter of the Riverview Adversary Proceeding does not restrict Columbia's ability
7 to close and obtain permits, only the use of the property is restricted. The covenant states: "No portion
8 of the Declarant's Parcels shall be used for the operation of a full service bank, savings and loan, credit
9 union, depository institution or similar financial institution. . .". [Riverview Complaint, Adv. Case No.
10 99-0496, Exhibit A].

11 Neither the Columbia Purchase Contract, nor the standard form contract approved by the Court,
12 contains a condition precedent to Columbia's obligation to close pertaining to use of the property as a
13 financial institution. Columbia has been able to close on the transaction all along, and litigate the use
14 issue afterward.

15 Furthermore, title objections were required to be made, if at all, within the initial 30-day
16 inspection period provided for in the standard form purchase contract and the Columbia Purchase
17 Contract. This provision was intended to insure the prompt identification of title or other inspection
18 period objections. Under the Columbia Purchase Contract, Columbia was required to either waive its
19 objections and close, or to terminate the contract, but the Debtor has failed to enforce such provisions.

20 On the other hand, there is no issue whatsoever relating to RTM's ability to use the property as
21 a restaurant.

22 **C. RTM's Bid Would Allow the Transaction to Close Within Sixty-seven Days.**

23 Under the Second Amendment to Purchase and Sale Agreement to be entered into by the Debtor
24 and Columbia, the closing, which should have occurred in July 1999, is now set to take place within
25 seven (7) days after Columbia obtains "a final, non-appealable order from the Court confirming that the
26 sale of the Real Property is free and clear of the Restriction." [Second Amendment, ¶ 4]. Given the
27 appeals process, this could take an undetermined number of months, as Columbia and the Debtor have
28

1 not yet filed a response to the adversary complaint.

2 In the alternative, RTM's purchase contract provides for the closing to occur within seven (7)
3 days after the sixty (60) day Permit Period. [Purchase Contract, ¶12].

4 The Court has wide latitude to grant or deny approval of such sales and may disagree with the
5 trustee's recommendations to take the highest bid, "for the purpose of safeguarding the interest of the
6 parties concerned, such as creditors and bidders." In re Bakalis, 220 B.R. 525, 532 (E.D.N.Y. 1998),
7 citing G-K Development Co., at 994 F.2d 746. Finding that Columbia is in default will cause RTM to
8 commence its due diligence and work toward closing the transaction within much shorter time periods
9 than contained in the Columbia Purchase Contract. RTM is allowed a total of sixty-seven (67) days to
10 close. Termination of Columbia's Purchase Contract will render the adversary proceeding moot and
11 eliminate Debtor's further expenditure of fees and costs on that endeavor. More importantly, it will
12 allow the Estate to accrue interest on the full purchase price over the months that it would have
13 otherwise taken Columbia to close the transaction, which at 8% would amount to over \$7,000 per month
14 in income to the Estate. A much greater chance at closing the transaction in short amount of time would
15 make up the difference between the two bids in short order. For these reasons, it is in the best interests
16 of the Estate to terminate Columbia's Purchase Contract for its failure to close the transaction on a
17 timely basis and move forward with RTM's Purchase Contract. If the Court also concludes that
18 Columbia did not make a timely or valid objection as to the restrictive covenant it now complains of or
19 that Columbia did not make a timely or valid election to terminate the Columbia Purchase Contract
20 under its original terms, then the Court could also determine that Columbia's earnest money has been
21 fully earned by the Debtor and is non-refundable to Columbia. This would more than make up the
22 difference between the bids of Columbia and RTM.

23 **IV. Conclusion.**

24 Columbia's Purchase Contract provides for a thirty (30) day inspection period, which runs
25 concurrently with a sixty (60) day permit period. Thereafter the Columbia Purchase Contract varies
26 from the standard form purchase contract in that it contains two additional extensions to the permit
27 period, which if they are exercised, would run an additional forty-five (45) days. All periods run from
28

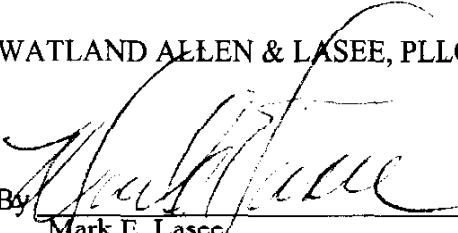
1 the Effective Date, which is the date the last party to the agreement executes it. That date was April 7,
2 1999. Assuming that the extensions were properly elected, then the permit period would run on July
3 21, 1999. Closing would be required to take place no later than seven (7) days later, July 28, 1999.
4 Pursuant to Section 24 of the Purchase Contract, time is of the essence. Columbia has had ample time
5 to close this transaction.

6 Further extension of the time periods and waiver of Debtor's rights under the Columbia Purchase
7 Contract are outside of the ordinary course of business and not in the best interests of the Estate. In the
8 event the Court approves such a transaction, the Estate will be faced with the potential loss of income
9 generated from the sales price and the attorneys fees incurred by the Estate in defending the adversary
10 proceeding. Such approval will also cast into doubt the credibility of the bidding process, since the
11 Debtor will be given significant latitude to change the terms of the bid, causing significant impact to any
12 backup bid.

13 For these reasons RTM respectfully requests the Court to cause the Debtor to enforce the terms
14 of the Columbia Purchase Contract, as written. Since Columbia is beyond the date in which it was to
15 close this transaction, Debtor should be ordered to terminate the Columbia Purchase Contract, in
16 accordance with its terms and give RTM notice to proceed. If the Court also determines it is appropriate
17 to do so, the Court should order that Columbia's earnest money paid to date is non-refundable under the
18 original term of the Columbia Purchase Contract.

19 DATED this 23rd day of August, 1999.

20 WATLAND ALLEN & LASEE, PLLC

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22
23 By 

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